DATUK ISHAK ISMAIL A

v.

SECURITIES COMMISSION

HIGH COURT MALAYA, KUALA LUMPUR B
MOHD ZAWAWI SALLEH J
[JUDICIAL REVIEW NO: R2-25-438-2010]
18 JANUARY 2011

SECURITIES: *Investigation - Power to call for investigation - Securities Commission issuing a s. 134 notice to applicant under Securities Commission Act 1993 - Whether issuance of notice justified - Whether decision of Securities Commission could be subjected to judicial review - Securities Commission Act 1993, ss. 16, 125 & 134 - Rules of the High Court 1980, O. 53 r. 2(4)* C D

ADMINISTRATIVE LAW: *Exercise of administrative powers - Judicial review - Decision of Securities Commission to issue applicant a s. 134 notice under Securities Commission Act 1993 - Whether decision reviewable - Whether issuance of notice justified - Securities Commission Act 1993, ss. 16, 125 & 134 - Rules of the High Court 1980, O. 53 r. 2(4)* E

The Securities Commission ('SC') commenced an investigation concerning the affairs of Kenmark Industrial Co (M) ('Kenmark Investigation') and directed 39 individuals including the claimant to be examined in relation thereto. The claimant did not adhere to the said order and the SC commenced a civil action against him *vide* originating summons ('OS') on the grounds that he had breached ss. 177 and 188 of the Capital Market and Services Act 2007 ('CMSA'). The SC then obtained an *ex parte* order to restrain the applicant from dealing with the sales proceeds from the Kenmark shares and compelled the applicant to disclose his assets by way of affidavit. Whilst the OS was ongoing, the SC continued with the Kenmark Investigation and pursuant to s. 134 of the Securities Commission Act 1993 ('SCA'), requested the applicant to attend before the SC for oral investigation ('said notice'). The applicant filed this application for judicial review against the said notice. In September 2010, the court granted an interim stay for the said notice pending the disposal of the leave application on an *inter partes* basis, which happened in November 2010. The applicant is seeking *inter alia* an order for *certiorari* to quash the decision of the SC issued under the said notice, F G H I

prohibition to prevent any further action by the respondent pursuant to the said notice or any other notice that may be issued in relation to the matters forming the subject matter of the OS issued under s. 134 of the SCA, a declaration that the decision of the SC by way of the said notice issued under s. 134 of the SCA had been an abuse of process and/or an interference with the administration of justice and an order that the implementation of the decision of the SC by way of the said notice be stayed pending the determination of the application for judicial review filed herein. The sole issue that arose for determination was whether in the circumstances of the case, the Court should interfere with the power of the SC to examine the appellant orally under s. 134 of the SCA.

Held (dismissing the applicant's application with costs):

(1) The SC had been a regulatory and corporate body established under the SCA. Market misconducts were deemed offences and regulated under the CMSA. In performing its functions, the SC *vide* s. 16 of the SCA had been granted all such powers as may be necessary for or in connection with or incidental to, the performance of its functions under the securities laws, which included enforcement and investigating market misconducts. The Enforcement and Investigation powers of the SC could be derived from Part V of the SCA. Section 125 of the SCA provided that an Investigating Officer of the SC may carry out investigations on any offence under the securities law, and as part of its investigation process, the SC was invested with the power to call for the examination of individuals. (paras 15-18)

(2) The applicant's contention that the decision to issue a s. 134 notice had been a reviewable decision within O. 53 r. 2(4) Rules of the High Court 1980 ('RHC'), would be accepted. The SC had been a public authority whose decisions had been subject to judicial review. The applicant had been adversely affected by the decision as the said notice, directed at him, had required him to attend at the office of the respondent to be examined orally in relation to an investigation into the offence under securities laws. (paras 19 & 20)

(3) Looking at the said notice under s. 134, leave ought not to be granted. A s. 134 notice had merely been to allow the SC to call the applicant for oral examination as part of its investigating process. It was to enable the SC to perform its regulatory functions and to provide adequate protection to the securities market in Malaysia. A power of quashing a criminal investigation should be exercised sparingly and with circumspection. At this stage, there had not been any justification to embark on an enquiry as to whether the investigating officer of the SC had reasonable grounds to believe that the applicant could give information relevant to the matter that he had been investigating and if he therefore had been justified in requiring the applicant to appear before him for oral examination. (paras 22 & 23)

(4) Even if the dispute had been of a civil nature, it could not be made a ground for quashing a s. 134 notice. The applicant's allegation that the issuance of a s. 134 notice had been in complete disregard to the rules of evidence and the rules of civil procedure had no merit. (paras 27 & 28)

(5) The court's discretion to grant leave should be exercised with caution. Indiscriminate and unjustified exercise of this discretion could lead to unjustifiable inferences in criminal investigations carried out by the SC. Judicial restraint was advised in issues of this nature. (para 29)

Case(s) referred to:

Securities Commission v. Up & Famous Sdn Bhd & Ors [2010] 1 LNS 76 HC ***(refd)***

QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532 CA ***(refd)***

Pratibha Rani v. Suraj Kumar & Anor [1985] 2 SCC 370 ***(refd)***

R v. Securities and Future Authority ex p Pantoh (Unreported) ***(refd)***

State of Bihar v. Murad Ali Khan & Ors (1988) [4] SCC 655 ***(refd)***

State of West Bengal v. Swapan Kumar Guha (1982) [1] SCC 561 ***(refd)***

Legislation referred to:

Capital Markets and Services Act 2007, ss. 177, 188

Rules of the High Court 1980, O. 53 r. 2(4)

Securities Commission Act 1993, ss. 16, 125, 134

A *For the applicant - Dato' Ambiga Sreenevasan (Mark Lau & Cains Tan with her); M/s Sreenevasan Young*
For the Attorney General - Aida Adhha Abu Bakar SFC
For the respondent - Tommy Thomas; M/s Tommy Thomas

B *Reported by Sharmini Pillai*

JUDGMENT

C **Mohd Zawawi Salleh J:**

Introduction

[1] This is the applicant's *ex parte* application for leave to apply for judicial review for the following reliefs:

D a) An order for *certiorari* to move into this Honourable Court and quash a decision of the Securities Commission by notice dated 14 September 2010 issued by its Investigating Officer under s. 134 of the Securities Commission Act 1993, requiring the applicant to attend the offices of the respondent to be
E examined orally in relation to an investigation into an offence under the securities laws; and

b) Prohibition to prevent any further action by the respondent pursuant to the notice dated 14 September 2010 or any other
F notice that may be issued in relation to the matters forming the subject matter of Kuala Lumpur High Court Originating Summons No: D-24NCC-192-2010 issued under s. 134 of the Securities Commission Act 1993, requiring the applicant to attend the offices of the respondent to be examined orally in
G relation to an investigation into an offence under the securities laws; or

c) Alternatively, a declaration that the decision of the Securities Commission by notice dated 14 September 2010 issued by the
H its Investigating Officer under s. 134 of the Securities Commission Act 1993, requiring the applicant to attend the offices of the respondent to be examined orally in relation to an investigation into an offence under the securities law is illegal, an abuse of process and/or is otherwise an interference
I with the administration of justice; and

d) An order that the implementation of the said decision of the Securities Commission by notice dated 14 September 2010 issued by its Investigating Officer be stayed until the determination of the application for judicial review filed herein or until further order;

e) That the costs of and occasioned by this application be costs in the cause; and

f) Such further and other relief and/or directions as this Honourable Court deems fit.

[2] After considering the submissions filed by parties, the court dismissed this application with costs fixed at RM10,000 for the respondent.

Facts Of The Case

[3] Somewhere between June 2010 and early September 2010, the Securities Commission ("SC"), commenced an investigation concerning the affairs of Kenmark Industrial Co (M) ("Kenmark Investigation"). The SC directed 39 individuals to be orally examined in relation to the Kenmark Investigation which includes the applicant. Everyone adhered to the said order except the applicant.

[4] On 16 June 2010, SC commenced a civil action in the Kuala Lumpur High Court Originating Summons No: D-24NCC-192-2010 ("originating summons") against the applicant on the grounds that the applicant had allegedly breached ss. 177 and 188 of the Capital Markets and Services Act 2007 ("CMSA"). The details of the originating summons have not much relevance in this judicial review. Suffice to note that based on the SC's ongoing investigations, and on the information presently available to them, SC is satisfied that the applicant has acted in breach of s. 177 of the CMSA and is an "insider" within the meaning of s. 188 of the CMSA.

[5] On 16 June 2010, the SC obtained an *ex parte* order to restrain the applicant from dealing with the sale proceeds from the Kenmark shares and compelled the applicant to disclose by way of affidavit all his assets.

[6] This did not go well with the applicant and they are currently pursuing the matter in the abovementioned originating summons suit.

[7] In the midst of the originating summons, the SC continued with their Kenmark Investigation. Under s. 134 of the Securities Commission Act 1993, *vide* a notice in writing, the SC requested the applicant to attend before the SC for oral examination.

[8] This is when the applicant filed this application for a judicial review against the s. 134 notice. On 23 September 2010, the court had made an order granting an Interim Stay for the SC's Notice dated 14 September 2010 until the leave application was determined on an *inter parte* basis.

[9] On 2 November 2010, the leave application was heard on an *inter parte* basis.

The Applicant's Submission

[10] The applicant submits that the SC had abused its powers because the s. 134 notice to call for the examination of the applicant is issued after the abovementioned originating summons was filed. The applicant reasons that any investigation into alleged breaches by the applicant of the securities laws particularly pursuant to ss. 177 and 188 of the CMSA ought to have been conducted before the filing of the abovementioned originating summons.

[11] It is the applicant's fear that any evidence collected during the oral examination under s. 134 notice will then be used to bolster the SC's case in the abovementioned originating summons in complete disregard of the rules of evidence and the rules of civil procedure.

[12] The applicant contends that the decision to issue the s. 134 notice is amenable to judicial review because the applicant is a party who is adversely affected by such decision. The applicant also requested for a stay of the implementation of the s. 134 notice until the determination of the substantive application in this judicial review application.

The Respondent's Submission

[13] In replying to the applicant's submission, the respondent detailed the powers and authorities of the SC under the Securities Commissions Act 1993 and the CMSA and submits that the SC may proceed by way of civil or criminal action, or both, against persons it suspects of committing offences under *inter alia* ss. 177 and/or 188 of the CMSA. Any such person is legally bound to answer all questions relating to such investigation and state the truth. Such statement made and/or recorded shall be admissible as evidence in any proceeding in any court.

Findings Of The Court

[14] The court has considered the rival submissions.

[15] The SC is a regulatory body and a corporate body established under the Securities Commission Act 1993. In *Securities Commission v. Up & Famous Sdn Bhd & Ors* [2010] 1 LNS 76, Mohd. Hishamudin J (as he then was) gave some background details about the SC as follows:

> The Securities Commission is a body corporate established under s. 3 of the Securities Commission Act and is the sole regulatory agency for the capital market in Malaysia. The Commission is charged by the Act with the duty of supervising and monitoring the activities of market institutions (for example, Bursa Malaysia), the conduct of public listed companies, and regulating all persons licensed under the Securities Industry Act 1983 (see s. 15(1) of the Securities Commission Act). The Commission is empowered by statutes to enforce both the Act and the Securities Industry Act.
>
> [6] One of the functions of the Commission is to maintain investors' confidence in the securities market by providing adequate protection to such investors. In carrying out this function, the Commission may enquire into corporate deals that are open to question in order to preserve the integrity of the Malaysian capital market and to maintain investors' confidence.
>
> [7] The Commission is thus entrusted by Parliament to protect investors, particularly, individual members of the investing public, who purchase shares of public companies whose shares are traded on Bursa Malaysia.

[16] It is not disputed that market misconducts are deemed as offences and are regulated under CMSA. The two relevant sections in which the applicant was alleged to have breached are s. 177 and s. 188 of the CMSA. For convenience, I reproduce the two sections below:

Part V

Market Misconduct And Other Prohibited Conduct

Section 177: False or misleading statements, etc.

A person shall not make a statement, or disseminate information, that is false or misleading in a material particular and is likely to induce the sale or purchase of securities by other persons or is likely to have the effect of raising, lowering, maintaining or stabilising the market price of securities if, when he makes the statement or disseminates the information:

(a) he does not care whether the statement or information is true or false; or

(b) he knows or ought reasonably to have known that the statement or information is false or misleading in a material particular.

Section 188: Prohibited conduct of person in possession of inside information

(1) A person is an "insider" if that person -

(a) possesses information that is not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of securities; and

(b) knows or ought reasonably to know that the information is not generally available.

(2) An insider shall not, whether as principal or agent, in respect of any securities to which information in subsection (1) relates -

(a) acquire or dispose of, or enter into an agreement for or with a view to the acquisition or disposal of such securities; or

(b) procure, directly or indirectly, an acquisition or disposal of, or the entering into an agreement for or with a view to the acquisition or disposal of such securities.

(3) Where trading in the securities to which the information in subsection (1) relates is permitted on a stock market of a stock exchange, the insider shall not, directly or indirectly, communicate the information referred to in subsection (1), or cause such information to be communicated, to another person, if the insider knows, or ought reasonably to know, that the other person would or would tend to -

(a) acquire, dispose of, or enter into an agreement with a view to the acquisition or disposal of, any securities to which the information in subsection (1) relates; or

(b) procure a third person to acquire, dispose of or enter into an agreement with a view to the acquisition or disposal of, any securities to which the information in subsection (1) relates.

(4) A person who contravenes subsection (2) or (3) commits an offence and shall be punished on conviction to imprisonment for a term not exceeding ten years and to a fine of not less than one million ringgit.

(5) The Minister may make regulations in respect of any particular class, category or description of persons or any particular class, category or description of transactions, relating to securities, to whom or which this section does not apply.

[17] In performing its functions, the SC, *via* s. 16 of the Securities Commission Act 1993, is granted all such powers as may be necessary for or in connection with or reasonably incidental to, the performance of its functions under the securities laws. This includes enforcement and investigating market misconducts. The Enforcement and Investigation powers of the SC can be derived from Part V of the Securities Commission Act 1993.

[18] Section 125 of the Securities Commission Act 1993 provides that an Investigating Officer of the SC may carry out investigation of any offence under the securities law. As part of its investigation process, the SC is invested with the power to call for examination of individuals. For the sake of clarity, I reproduce the relevant parts of s. 134 as follows:

Section 134: Power to call for examination

(1) If an Investigating Officer of the Commission carrying out an investigation under any securities law suspects or believes on reasonable grounds that any person can give information relevant to a matter that he is investigating, the Investigating Officer of the Commission may by notice in writing to such person require such person -

(a) to give to the Investigating Officer of the Commission all reasonable assistance in connection with the investigation; and

(b) to appear before a specified Investigating Officer of the Commission or specified Investigating Officers of the Commission to be examined orally.

...

(2) A person referred to in subsection (1) shall be legally bound to answer all questions relating to such case put to him by the Investigating Officer of the Commission and to state the truth, whether or not the statement is made wholly or partly in answer to questions, and shall not refuse to answer any question on the ground that it tends to incriminate him.

...

(4) Any statement made and recorded under this section shall be admissible as evidence in any proceeding in any Court.

(5) Any person who -

(a) fails to appear before an Investigating Officer of the Commission as required under subsection (1);

(b) refuses to answer any question put to him by an Investigating Officer of the Commission as required under subsection (2) or neglects to give any information which may reasonably be required of him and which he has in his power to give;

(c) knowingly furnishes to an Investigating Officer of the Commission information or statement that is false or misleading in any material particular, shall be guilty of an offence and shall on conviction be punished with a fine not exceeding one million ringgit or imprisonment for a term not exceeding five years or both;

(d) obstructs an Investigating Officer of the Commission in carrying out an investigation under this section.

[19] Relying on *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532, the applicant is contending that the decision to issue a s. 134 notice is a reviewable decision within O. 53 r. 2(4) of the Rules of the High Court 1980 ("RHC"). In *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* at p. 536, Gopal Sri Ram JCA (as he then was) stated that the refusal of an extension of time by the SC *via* a letter for the appellant's board to take the usual steps with regard to the take-over bid in accordance with the Take-Over Code was a decision within RHC O. 53 r. 2(4). The learned judge said:

> [2] The facts are these. The appellant was the target company in a take-over bid made by Kulim (Malaysia) Berhad, the second respondent in this case. The appellant's board was obviously unhappy with this. So it engaged the Securities Commission, the first respondent before us, in some correspondence. On 14 October 2005, *the Commission wrote refusing an extension of time for the appellant's board to take the usual steps with regard to the take-over bid in accordance with the Take-Over Code. The appellant then applied for leave to issue judicial review against the Commission.* The respondents appeared at the *ex parte* hearing and argued that leave should be refused. The learned judge after a protracted hearing refused leave. *She correctly concluded that the Commission's letter was a decision within RHC O. 53 r. 2(4)*. However, she went on to hold that the appellant was not a person "adversely affected" within the aforesaid sub-rule and accordingly lacked standing to make the application. She also held that the appellant had failed to exhaust the alternative remedy. On these two grounds she refused leave to apply for judicial review. (emphasis added)

[20] The court agrees. The SC is a public authority whose decisions are amendable to judicial review. The applicant is a person adversely affected by the decision as the notice is directed at him, requiring him to attend the office of the respondent to be examine orally in relation to an investigation into the offence under the securities laws. In *R v. Securities and Future Authority ex p Pantoh* (unreported 20 June 1994) Sir Thomas Bingham had this to say:

> It seems to me quite plain they are bodies over whom the court can, in appropriate circumstances, and will exercise a supervisory jurisdiction, but recognition of that jurisdiction must in my judgment be combined with a recognition that the clear intention of the Act is that the bodies established under that Act should be regulatory bodies and that it is not the function of the court in anything other than a clear case to second guess their decisions or, as it were to look over their shoulder.

[21] However, the critical question to be decided is this: whether in the circumstances of the case, the court should interfere with the power of the SC to examine the appellant orally under s. 134 of the Securities Commission Act 1993.

[22] Looking at the s. 134 notice, I am of the considered view that leave ought not be granted. As I have mentioned earlier, s. 134 notice is merely to allow the SC to call the applicant for oral examination as part of its investigating process. This is to enable the SC to perform its regulatory functions and to provide adequate protection to the securities market in Malaysia.

[23] A power of quashing of a criminal investigation should be exercised sparingly and with circumspection and that too in the rarest of rare cases. At this stage, the court would not be justified in embarking upon a inquiry whether the Investigating Officer of the Commission has reasonable grounds to believe that the appellant can give information relevant to the matter that he is investigating and therefore justified in requiring the appellant to appear before him to be examined orally.

[24] To my mind, the issue at hand is similar to the principles relating to the quashing of the First Information Report ("FIR"). In *State of West Bengal v. Swapan Kumar Guha* (1982 [1] SCC 561) Chandrachud, CJ (as His Lordship then was) had observed that if the FIR did not disclose the commission of a cognizable offence, the court would be justified in quashing the investigation on the basis of the information as laid or received. In the same judgment, Justice A.N. Sen (as His Lordship then was) who has written the main judgment, had laid down the legal propositions as follows:

> … the legal position is well-settled. The legal position appears to be that if an offence is disclosed, the Court will not normally interfere with an investigation into the case and will permit investigation into the offence alleged to be completed; if, however, the materials do not disclose an offence, no investigation should normally be permitted … Once an offence is disclosed, an investigation into the offence must necessarily follow in the interests of justice. If, however, no offence is disclosed, an investigation, in the absence of any offence being disclosed, will result in unnecessary harassment to a party, whose liberty and property may be put to jeopardy for nothing. The liberty and property of any individual are sacred and sacrosanct and the court

zealously guards them and protects them. An investigation is carried on for the purpose of gathering necessary materials for establishing and proving an offence which is disclosed. When an offence is disclosed, a proper investigation in the interests of justice becomes necessary to collect materials for establishing the offence, and for bringing the offender to book. In the absence of a proper investigation in a case where an offence is disclosed, the offender may succeed in escaping from the consequences and the offender may go unpunished to the detriment of the cause of justice and the society at large. Justice requires that a person who commits an offence has to be brought to book and must be punished for the same. If the court interferes with the proper investigation in a case where an offence has been disclosed, the offence will go unpunished to the serious detriment of the welfare of the society and the cause of justice suffers. It is on the basis of this principle that the court normally does not interfere with the investigation of a case where an offence has been disclosed … Whether an offence has been disclosed or not must necessarily depend on the facts and circumstances of each particular case … If on a consideration of the relevant materials, the court is satisfied that an offence is disclosed, the court will normally not interfere with the investigation into the offence and will generally allow the investigation into the offence to be completed for collecting materials for proving the offence.

[25] In *Pratibha Rani v. Suraj Kumar and Anor.* [1985] 2 SCC 370, the court at p. 395 observed as follows:

It is well settled by a long course of decisions of this Court that for the purpose of exercising its power under Section 482 Cr OC to quash a FIR or a complaint the High Court would have to proceed entirely on the basis of the allegations made in the complaint or the documents accompanying the same *per se*. It has no jurisdiction to examine the correctness or otherwise of the allegations.

[26] Again in the case of *State of Bihar v. Murad Ali Khan & Ors* (1988 [4] SCC 655), Venkatachaliah, CJ (as His Lordship then was) has laid down that the jurisdiction under s. 482 of the Code has to be exercised sparingly and with circumspection and has observed that in exercising that jurisdiction, the High Court should not embark upon an inquiry whether the allegations in the complaint are likely to be established by evidence or not.

[27] It is pertinent to note that even if the dispute is of civil nature, it cannot be made a ground for quashing s. 134 notice. Many times a wrong, as in the instant case, gives rise to a civil as well as criminal cause of action. However, where the wrong appears to be purely civil and the fact does not disclose the commission of any offence and the investigation has been carried out only with a view to pressurize or intimidate the opposite party, the court would be failing its duty if it does not quash the notice and leave the parties to have recourse to a civil remedy alone.

[28] In the light of the above referred judgment and principles enunciated therein, the applicant's allegation that the issuance of s. 134 notice is in complete disregard of the rules of evidence and the rules of civil procedure has no merit. There was not a shred of evidence disclosed in the applicant's affidavit in support of the application to substantiate the allegation that any evidence collected under 134 notice will be used to bolster the SC's case in the above mentioned originating summons. With respect, the allegation and/or assertion is purely speculation and fanciful conjuncture. Indeed, it is a thinly veiled attempt on the part of the applicant to halt the SC from conducting its investigation. If this is allowed, the SC would not be able to perform its statutory function.

[29] It is imperative that the court's discretion to grant leave be exercised with caution. Indiscriminate and unjustified exercise of this discretion can lead to unjustifiable inference in the criminal investigation by the SC. Judicial restraint is advised in issue of this nature. Lord Scarman recognized this when he stated: "judicial review is a great weapon in the hand of judges: but the judges must observed the constitutional limits set out by our Parliamentary system upon the exercise of this "beneficent power"."

[30] For the reasons adumbrated above, this application was dismissed with cost of RM10,000 to the respondent.